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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

APPELLANT'S BRIEF.

WM. M. LEWIN,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 45.

JESSIE E. THOMPSON, APPELLANT,

vs.

CHARLES N. THOMPSON.

Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (35 App. Cas. D. C., 14). The parties are husband and wife. The wife filed a bill in the Supreme Court of the District of Columbia (1), under section 980 of the District Code, for maintenance of herself and child. The husband interposed a plea (17) to the effect that he had been granted a divorce *a mensa et thoro* by a court of the State of Virginia.

The plea was overruled (25), whereupon the husband answered (5) denying his wife's charges of cruelty and desertion, averring that she had deserted him (10); again setting up (12) the Virginia divorce (24), and demanding that it be given full faith and credit (13). Upon joinder of issue (25) and testimony in behalf of the respective parties (26) the Supreme Court of the District of Columbia decreed that the husband pay to the wife seventy-five dollars ($75) a

In

month for the maintenance of herself and their minor child, besides five hundred dollars ($500) for counsel fees.

The husband appealed to the Court of Appeals (486), which court reversed the decree of the Supreme Court of the District of Columbia and remanded the cause with directions to vacate the decree and dismiss the bill (504).

From the decree of reversal the wife appealed to this court (509). The opinion of the Court of Appeals will be found at page 495 of the record.

The bill in this case, duly verified, was filed July 29, 1907 (1). Subpœna to answer was issued at the same time (492), alias and pluries writs being duly issued and returned, without break, until the husband was served November 18, 1907 (493).

It is disclosed by a duly certified copy of the record of the Virginia proceedings (18), marked Exhibit A and made a part of the husband's answer (18), that the Virginia proceedings in which the divorce *a mensa et thoro* was decreed were begun September 3, 1907, by the issuance of a summons (18-19) to the wife, under section 3223 of the Virginia Code, to appear on the third Monday in September (September 16), 1907, to answer a bill exhibited against her by her husband.

On the same day, as a basis for an order of publication (19), the husband filed an affidavit, under section 3230 of the Virginia Code, made, however, upon information and belief, that the wife was at that time not a resident of the State of Virginia (20).

Upon this affidavit the clerk issued an order of publication against the wife, ordering her to appear within fifteen days after due publication of the order (20).

There is an editor's certificate (20) that the order of publication was published for the time required by section 3231 of the Virginia Code, four weeks from September 5, 1907.

The clerk filed a certificate, under section 3231 of the Virginia Code, that the order of publication was duly posted at the court-house door (21).

On September 16, "the third Monday in September," the return day of the summons (19), the husband filed in the Circuit Court of Loudoun County, Virginia, a bill for divorce *a mensa et thoro* (21), under section 2258 of the Virginia Code, on the ground of desertion.

In addition to publication, the non-resident wife was served personally with the Virginia summons in the District of Columbia (19), under the latter part of section 3232 of the Virginia Code.

The return of Stephen B. Callahan, United States deputy marshal, District of Columbia (19), shows that such personal service was made September 21, 1907.

On October 19, 1907, the Virginia court passed a decree granting to the husband a divorce *a mensa et thoro*, and further ordering that the respective parties be divested of all marital rights in each other's property (24). This decree is a part of the record ("defendant's Exhibit A") made a part of the husband's plea in the District of Columbia proceedings (17), and upon the plea being overruled by Justice Gould (25) the same record is made a part of the husband's answer to the bill of complaint in the Supreme Court of the District of Columbia (18). From the decree of Mr. Justice Barnard (486), decreeing maintenance and the custody of the child, the husband appealed to the Court of Appeals of the District of Columbia (486), and filed a supersedeas bond on the 15th day of July, 1909 (486).

On April 5, 1910, the Court of Appeals reversed the decree of the Supreme Court of the District of Columbia and remanded the cause, with directions to vacate the decree and dismiss the bill (503).

On motion, the decree of the Court of Appeals was modified by requiring the husband to pay the costs in that court (504).

Whereupon the wife filed an affidavit, made by Dr. Johnson Eliot, a physician of said District, that, in his opinion, the health of the parties is good, and that their expectancy

of life is equal to that indicated by the standard mortality tables (505). The wife made a similar affidavit as to her child, and showed the expectancy of life in the child's case to be more than forty-seven years (508).

She also filed the affidavit of George C. Jordan, showing the expectancy of either the husband or the wife to exceed twenty-five years (506).

The wife assigned errors (506) and moved for the allowance of an appeal to this court (507), which motion was overruled (508). Whereupon application was made to the Chief Justice, who, on May 4, 1910 (508), allowed the appeal, the appellant giving the required supersedeas bond (509), whereupon the case was duly brought to this court.

Assignments of Error. (506.)

I. The Court of Appeals of the District of Columbia erred in reversing the decree of the Supreme Court of the District of Columbia, rendered July 13, A. D. 1909 (486), and in directing said last-named court to dismiss the bill of complaint therein exhibited in the cause between this appellant and Charles N. Thompson, the above-named appellee.

II. The said Court of Appeals erred in holding that the decree rendered by the Circuit Court of Loudoun County, Virginia, on the 19th day of October, A. D. 1907, purporting to divorce *a mensa et thoro* this appellant from the said appellee (24) [*is valid*].

III. The said Court of Appeals erred in holding that said alleged decree of divorce (24) is conclusive as to this appellant and binding upon her in said District of Columbia.

Specifications of Error.

The Court of Appeals of the District of Columbia erred:

I.

In holding that the decree of the Virginia court, divorcing the parties *a mensa et thoro*, is entitled to full faith and credit in the District of Columbia.

II.

In holding that the affidavit of the appellee (19, 20) as basis for an order of publication against the appellant, defendant in the Virginia suit, was a sufficient affidavit to support the validity of the Virginia decree (500).

III.

In holding that the personal service made by S. B. Callahan (19) subsequent to the return day therein did not vitiate the constructive notice by publication (20) and render the decree void.

The Jurisdiction of this Court.

Before taking up the specifications of error the attention of the court will be called to the question of the jurisdiction of this court.

The appeal is based upon the provisions of section 233 of the Code of Law for the District of Columbia, providing for appeals to this court from the Court of Appeals of said District from a final decree *in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.*

The provisions of the Code under which the suit is brought are as follows:

Whenever any husband shall fail or refuse to maintain his wife and minor children, if any, although able to do so, the court, on application of the wife, may decree that he shall pay her, periodically, such sums as would be allowed to her as permanent alimony in case of divorce for the maintenance of herself and the minor children committed to her care by the court, and the payment thereof may be enforced in the same manner as directed in regard to such permanent alimony.

Code D. C., section 980.

Section 980 of the Code is declaratory of the inherent powers of a court of equity, and *alimony* and *maintenance* mean the same thing.

Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 488.

It would seem that prior to the effect of the Code (January 1, 1902, ~~section 301~~) the amount of alimony, even when in arrears, might, for cause shown, be changed by the court.

Tolman *vs.* Leonard, 6 App. Cas. D. C., 224, 233.
Davis *vs.* Davis, 29 App. Cas. D. C., 258, 263.

But that would not be the case now, for "no provision is found looking to the repayment by the wife of any installments which had been collected from the husband, in the event of a retroactive reduction of the allowance." It would seem, therefore, that no power to retroactively modify was intended.

Sistare *vs.* Sistare, 218 U. S., 1, 23.
Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 485.

The Code provides for enforcement of decrees of the Supreme Court of the District of Columbia, and a decree for alimony, or maintenance, is no exception to this rule. It is subject to immediate execution, and is appealable.

Code D. C., section 113.
Lesh *vs.* Lesh, 21 App. Cas. D. C., 475, 484, 485.

The court's discretion as to the amount is, in the first instance, judicial, not arbitrary. The discretion as to *future installments* is equally so, and such installments will not be interfered with except for good cause shown.

The existence of such future cause will not be *presumed* or anticipated, any more than in a case for specific performance, which is within the sound discretion of the court; it will not be presumed, in determining the jurisdiction on appeal, that the value of the land involved will be lessened by change of ownership or unfavorable change of occupants of adjacent property.

Weber *vs.* Travelers' Ins. Co., 45 Fed., 657.
Langan *vs.* Langan, 86 California, 132, 133.
~~Conant *vs.* Conant, 10 California, 249, 254.~~
McCaddin *vs.* McCaddin, 116 Md., 567, 574.

> "As the appellant is now of an age [nearly seventy] which may make it more difficult each year for him to earn a living it may become necessary to make some modification of the decree as to the amount, but that must depend upon future circumstances and *cannot be anticipated by us.*"
>
> McCaddin *vs.* McCaddin, 116 Md., 567, 574.

But the court will take judicial notice of the increased cost of support of the little daughter of the parties, for the next six years, thus making the necessary amount in excess of the sum necessary for the jurisdiction of this court.

McCaddin *vs.* McCaddin, 116 Md., 567, 571.

It is not necessary that the amount in controversy should be expressly stated in the bill of complaint.

U. S. *vs.* Freight Association, 166 U. S., 290, 310.
Ex parte Bradstreet, 7 Pet., 634, 647.

The husband's ability is plainly stated (3, 4).

The wife testifies that a monthly allowance of one hundred dollars was necessary for the maintenance of herself and child (129).

The husband's offer to make a monthly allowance of one hundred dollars (184) is an admission of the proper monthly allowance.

Oliver *vs.* Alexander, 6 Pet., 143, 148-9.

The appellate jurisdiction of this court extends to *all cases* in which there is a final decree involving more than five thousand dollars.

The decree of the Court of Appeals, from which this appeal is taken, is undoubtedly a final decree, and its finality is not affected by the fact that leave is given to apply at the foot of the decree.

C. & P. Tel. Co. *vs.* Manning, 186 U. S., 238, 241.

French *vs.* Shoemaker, 12 Wall., 86, 98.

Notwithstanding the testimony, the appellant concedes that the decree of the Supreme Court of the District of Columbia (486), awarding to the wife for the support of herself and child the sum of seventy-five dollars a month, must be taken as the measure of the value of the matter in dispute.

Red River Cattle Co. *vs.* Needham, 137 U. S., 632, 635.

A claim of alimony, even *pendente lite*, may afford the basis of this court's jurisdiction on appeal.

De La Rama *vs.* De La Rama, 201 U. S., 303, 318.

It is submitted that the mere fact that the decree, following the statute, decrees that payment shall be made periodically, instead of *in solido*, does not affect the question of jurisdiction, as the amount of the possible, indeed *reasonably probable*, payments under the decree will exceed five thousand dollars.

B. & O. S. W. R. R. *vs.* U. S., 220 U. S., 94, 106.

This case illustrates the principle that in determining the amount involved, for the purpose of appeal, the scope of the inquiry may be, and generally is, broader in a suit in equity than in a case at law.

Stinson *vs.* Dousman, 20 How., 461, 466-7.
N. E. Mortgage Co. *vs.* Gay, 145 U. S., 123, 131-2.
Troy *vs.* Evans, 97 U. S., 1, 3.
Marshall *vs.* Holmes, 141 U. S., 463, 595.

If the decree of the Court of Appeals stands, its effect will be to destroy the appellant's right, not merely to one installment of alimony, but it would strike down her right to *any* and *all* maintenance, which, in view of the age and circumstances of the parties, is, *in all human probability*, in excess of the required amount. The vice of such an argument consists in assuming that specific installments are alone involved and covered by the decree of the court. The jurisdiction in this case is measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. Cases seemingly at variance with this doctrine have been qualified and restricted by later decisions of this court.

Berryman *vs.* Whitman College, 222 U. S., 334, 346, 347, 348.

Statutes regulating appeals are remedial, and this court has always construed them liberally:

1. If a crime *might have been, a fortiori, might be*, punished with sufficient severity to make it an infamous crime, this court would take jurisdiction on appeal notwithstanding the fact that only a *nominal* fine was actually imposed.

The Paquete Habana, 175 U. S., 677, 682.

Luckman v Peyser, 169 U.S. 115, 129

2. In a case without precedent, and *"not free from difficulty,"* this court sustained its jurisdiction upon *"the rea-*

sonable inference" upon a mere *privilege,* which might never be exercised, that the amount involved was sufficient.

Harris *vs.* Barber, 129 U. S., 366, 369-70.

3. In a case involving a prosecution of an officer that *might* end in a sentence (*non constat* that he would be convicted) dismissing him from the service and [thus] depriving him of a salary, which in a certain number of years would exceed five thousand dollars, this court took jurisdiction on appeal.

Smith *vs.* Whitney, 116 U. S., 167, 173.

Alimony from time to time may be regarded as a portion of the salary of the husband, who may even be retired on half pay. This being so, such alimony is the subject of computation, and jurisdiction will be based thereon exactly as in the case of the entire salary.

Audubon *vs.* Shufeldt, 181 U. S., 575, 578.

It will be observed that in this case the Virginia divorce was only *a mensa et thoro* (24), therefore the parties are still husband and wife, without possibility of remarriage. Hence the installments may be valued like a simple annuity by reference to the mortality tables (Dunbar *vs.* Dunbar, 190 U. S., 340, 345).

Meaning of the Decree.

The decree is limited by the pleadings, which adhere to the requirements of the Code. The meaning of the decree, therefore, is that the husband shall pay to the wife at the least the sum of seventy-five dollars a month as long as the child may be dependent upon her for care and support.

Barnes *vs.* Chic., &c., Ry., 122 U. S., 1.

Pierce & Tenn. Coal, &c., R. R. Co., 173 U. S., 1, 9.

Ex parte Hart, 94 Calif., 254.

Carnig *vs.* Carr, 167 Mass., 544, 547.

McCaddin *vs.* McCaddin, 116 Md., 567, 574.

This court will take judicial notice of the usual tables, showing the expectancy of life of the parties and of the child.

Lincoln *vs.* Power, 151 U. S., 436, 441.

The wife was born in ~~1878~~ 1883 (112). The husband was born in 1866 (296). The child was born in 1907 (126). The affidavits filed by and on behalf of the wife (505, 506, 507) show the health of the parties and of the child to be good, and that in each case the expectancy of life is in excess of the requirements.

By the decree (486) the first payment of seventy-five dollars was to be made July 15, 1909, and a like sum on the fifteenth day of each month thereafter. At the end of five years and one month—that is to say, on the 15th day of July, 1914—the payments would amount to $4575. To this add the $500 for counsel fees and "the matter in dispute, exclusive of costs, will exceed the sum of five thousand dollars."

Less than two years of the time remains, thus bringing the case squarely within the requirements of Smith *vs.* Whitney, *supra*.

Upon the aforegoing considerations, it is submitted that this court has jurisdiction of this case upon appeal.

Deventer, against her (pp. 374, 377), and to exert a similar influence upon her cousin, Dr. Johnson Eliot (p. 382).

It was at the appellant's instance that Dr. Elliot's services were enlisted (p. 384).

If the doctor is in error as to the order of time in which he received any specific information, it is not to be wondered at.

Willett *vs.* Fister, 18 Wall., 91, 97.

It is difficult to determine upon what theory the appellee rests his defense. If he would have the court believe that his wife was overcome, at definite periods, by a weakness peculiar to her sex, her situation was one of peculiar sadness and the appellee's course towards his wife at the time, of all times, when she was in that condition which elicits the sympathy and tenderness of all normal people, would indicate that his love for his wife, if it ever existed, had turned to resentment and hate (p. 125).

It is true that in his Virginia bill "frankness constrains" (p. 23) him to admit that he had heard that she was pregnant, but as to this he could not affirm nor deny the truth, yet he had written his mother (p. 189) that his wife was in a "critical condition" ("pregnant (p. 389)").

Appellee is very fond of children (p. 336), yet matters so shaped themselves, by his procurement, that the mother was notified, when his child was two days old, that she was a divorced woman (p. 128).

Without means of realizing on her stock because of her husband's power in the premises, following the unavoidable delay in the determination as to the sufficiency of the Virginia divorce, there is small wonder that she wished to preserve her rights by a suit at law (p. 152), in the event that her efforts at relief in equity should fail. She was also delayed by her inability to sell her stock (p. 158) and by her own and her baby's illness (p. 159).

It is a serious matter that a teacher of one of our public schools should be charged with such gross misconduct. It is still more serious if he is guilty of such misconduct;

but the only thing the appellant is concerned with here is to obtain support for herself and her child.

If the appellee, occupying the conspicuous public position that he did (and still does), think so little of his reputation as to obtain extended leave of absence from this jurisdiction and to return with a Scotch verdict, obtained after an *ex parte* hearing, and sought to be maintained upon a sheer technicality, it can hardly be expected that this court will be very jealous of a reputation for which the appellant himself had so little regard.

The testimony of Dr. Keene (242) tends to show that the appellant was a great sufferer at certain periods. In such case the appellee's conduct towards her is all the more reprehensible.

A vast amount of the testimony produced by the appellee can have no purpose other than to prejudice the court against the appellant.

Under the terms "disposition" and "temperament" a thinly veiled attack is made upon her character.

The appellee's self-confessed conduct towards a frail and invalid wife may not be a bar to his Virginia decree, but it is a *fact*, nevertheless, which this court will consider upon the merits of the case.

Crosby *vs.* Buchanan, 23 Wall., 420, 454.

The witness Fairbrother (205, 206, 207) having died since his testimony was given his testimony will not be commented on by counsel.

This class of testimony is met by the testimony of:

Mrs. Van Deventer (p. 373);

Mr. Ralph Given (p. 378);

Mr. W. W. Boarman (p. 380);

Dr. Johnson Eliot (p. 381);

Mr. Harvey Given (p. 451);

Miss Mary J. Kerr, the appellant's old teacher and friend (p. 457);

Mrs. Ralph Given (p. 459);
Mrs. Given's sister, Miss McCauley (p. 468);

all of whom have a good word to say for Mrs. Thompson, most of them connected with her by blood or marriage and proud of that connection.

There is no motive of hostility suggested on the part of any witness against the appellee.

Mrs. Thompson could not sell her stock, and consequently could not even take her testimony. The meagre proceeds of the sale as eventually made barely sufficed to meet the preliminary demands of her suit.

There is strenuous effort on the part of counsel to discredit Mr. Gerdes by showing that he was a friend of Mrs. Thompson's father (p. 31), and yet the appellee testifies that Mrs. Thompson's father "would not trust old Gerdes for five cents" (p. 331).

There is not a particle of testimony brought to impeach:
Mr. Gerdes (p. 26);
Mrs. Gerdes (p. 51);
Mrs. Hood (p. 68);
Mr. Hood (p. 81);
Miss Hutcheson (p. 87);

who all testify to a condition of affairs that makes us wonder that this case ever found its way into a court of equity instead of the criminal court, and there on a trial for murder.

If the aforegoing testimony is believed this court will not spend much time upon the remainder.

If the testimony is believed, and it is inconceivable that it can be doubted by the court, it can not be deemed an unnatural thing for the afflicted wife to take her final departure.

On the 13th of the following June, upon the existence of the circumstances as narrated even by the appellee at page 338 of the record, it is respectfully submitted that the appellant was justified in leaving the appellee and the only wonder is that she was able to endure existence with him as

long as she did, and even if it should be deemed that she was not wholly free from blame, that would not justify the husband's conduct towards her.

Shaw *vs.* Shaw, 2 App. Cas. D. C., 204.

The Virginia decree was not final within the meaning of the full faith and credit clause of the Constitution.

The Virginia Code provides that any defendant not served with process, under section 3232, may within three years from the date of a decree petition to have the case reheard, and may plead or answer and have any injustice in the proceeding corrected.

Virginia Code, sect. 3233.

The Callahan service (19) was on September 21, 1907, commanding the defendant to appear on the third Monday in September, 1907. The third Monday in September, 1907, was September 16 and was already past. The service was therefore void and the defendant was not served with process under the provisions of section 3232 of the Code.

Raub *vs.* Otterback, 89 Va., 645.

This left the decree subject to be set aside in the discretion of the court.

While the appellant's rights cannot be made to depend upon this element of favor or discretion, it is sufficient to prevent the decree being final within the meaning of the full faith and credit clause of the Constitution.

Cheely *vs.* Clayton, 110 U. S., 701, 708.
Roller *vs.* Holly, 176 U. S., 398, 409.
Lynde *vs.* Lynde, 181 U. S., 183, 187.

The Decree is Void in Virginia.

The disclosures in the record of the Virginia proceedings (Exhibit A) (16), made a part of the appellee's answer to the bill of complaint in this case (12), control the recitals

in the decree of the Virginia court (24) as to personal service and publication.

Cheely *vs.* Clayton, 110 U. S., 701, 708.

The Jurisdictional Affidavit in the Virginia Case.

The affidavit "to be used as basis for an order of publication" (19), being made upon *information and belief* (20), is *not sufficient as a basis for an order of publication;* such publication was therefore unauthorized and all proceedings based upon it null and void.

The sufficiency of the affidavit is to be determined by the law of Virginia, and if the publication in the particular case be unauthorized no principle is perceived upon which it can be regarded as constructive notice.

Hollingsworth *vs.* Barbour, 4 Pet., 466, 474.

The sole authority for notice by publication is to be found in the Virginia Code, section 3230. *On what affidavit order of publication may be entered; when and by whom entered.*

ON AFFIDAVIT THAT A DEFENDANT IS NOT A RESIDENT OF THIS STATE * * * AN ORDER OF PUBLICATION MAY BE ENTERED AGAINST SUCH DEFENDANT.

Virginia Code, sect. 3230.

Of course, if the statements contained in the affidavit are *equivalent* to the statement that she is *not a resident of the* State, they would be sufficient, but a statement made upon information and belief cannot be equivalent to a direct statement unless the facts upon which the information and belief are based are set forth, so that the court may determine their reasonableness and sufficiency.

Clowser *vs.* Hall, 80 Va., 864.

Rice *vs.* Ames, 180 U. S., 371, 374.

Holmes v. Holmes, 15 Neb. 615. 616

Fulton v Levy, 21 Neb. 478. 482

The Virginia Code provides that * * * where an affidavit is required in support of any *pleading*, it shall be sufficient if the affiant swear that he believes it to be true.

Virginia Code, sect. 3282.

We have already seen (*Clowser vs. Hall, supra*) that such an affidavit will not support an attachment. That case brought about the amendment of the law with respect to the affidavit as a basis for an *attachment*, which may *now* be made upon information and belief, but left unchanged the requirement in a case like the one now before the court.

Virginia Code, sects. 2959, 3230.

See also:

Form of Affidavit for Attachment, Code, p. (1571).

Form of Order of Publication, Code, p. (1702).

An order of publication is not a *pleading*, it is *process;* the pleadings are made by the *parties;* the order of publication is issued by the clerk.

Section 32 of the judiciary act of 1789, ch. 20, now sect. 954, R. S. U. S., uses "process" as distinguished from "pleading."

See also:

Loeb *vs.* Columbia, &c., Trustees, 179 U. S., 472, 482.

A *motion*, although reduced to writing, is not a *pleading*.

Brownfield *vs.* South Carolina, 189 U. S., 426, 428.

An "*application for witnesses*" (affidavit) is not a pleading.

Tucker *vs.* U. S., 151 U. S., 164, 169.

Process by means of publication is purely statutory and not according to the course of the common law, and it can only be *instituted* in the manner required by the statute.

Cooper *vs.* Newell, 173 U. S., 555, 572.

If the affidavit had been as to the defendant's *domicile*, which may present a mixed question of *law* and fact, there would be some basis for the contention that an affidavit upon information and belief would be sufficient, but as to the mere *fact* of *residence* the affidavit must be *positive*.

Jackson *vs.* Webster, 6 Munf. (Va.), 462, 464.
Clowser *vs.* Hall, 80 Va., 864.

The Court of Appeals, in its opinion (501) in saying that the Virginia court had jurisdiction of the *subject-matter* of the suit, it is respectfully submitted, falls into the not uncommon error of confusing suits for divorce with those *in rem* proceedings, in which "the *thing* had been first SEIZED into the custody of the court."

In one of the leading cases in this court on the subject it is expressly recognized "that there are cases, when the judgment is to have an effect on *personal* rights, *as in divorce suits*," which are not to be assimilated too closely to those cases in which the *jurisdiction* is *acquired* by *seizure* of the property involved.

Cooper *vs.* Reynolds, 10 Wall., 308, 319.
Hamilton *vs.* Brown, 161 U. S., 256, 274.
Haddock *vs.* Haddock, 201 U. S., 562, 576.

Land may be drawn within the jurisdiction of the court by merely bringing a suit, but the jurisdictional necessity for the actual custody of *chattels* has been consistently applied, and for the same reason that a vested remainder in chattels was not subject to sale by common-law execution, as the *fi. fa.*, in either case requires actual custody and delivery of the goods.

Dargan *vs.* Richardson, Dud. (S. C.), 62.
Allen *vs.* Scurry, 1 Yerg. (Tenn.), 36.
Lockwood *vs.* Nye, 2 Swan (Tenn.), 515.

force
The ~~face~~ of the words "on affidavit," as used in the Virginia statute cannot be less than that of the word "there-

upon," construed as *jurisdictional* when applied to special statutory powers.

In re Pensacola Lumber Co., 8 Benedict, 171, 174.

The Personal Service.

The Court of Appeals (503) commends the practice of giving personal notice in addition to publication. This may be correct, but it is hardly applicable to the service in question.

The publication "notified" the plaintiff's pregnant wife (*and he knew she was pregnant, for he had so informed his mother* (189)) to appear in the Virginia court "within 15 days after due publication," and do what was "necessary to protect her interests."

This "notice" was published in the *Mirror* (20) for four weeks from September 5, 1907, some time subsequent to the time for her to appear in accordance with the terms of the "actual notice" which "on the same day" (19) the husband initiated. If he could not be expected to protect his wife's interests, surely she was justified in assuming that he would hardly dare violate those interests by sending her a misleading notice to protect them.

The courts indulge presumptions when the record is *silent* which are overcome when different evidence is disclosed or averments made; then why should not a defendant be permitted by the court to assume that there was no other time designated, and to rely upon an "actual notice" in lieu of the constructive (presumed) notice by publication?

Galpin *vs.* Page, 18 Wall., 350, 366.
Cheely *vs.* Clayton, 110 U. S., 701, 708.
Hays *vs.* U. S., 175 U. S., 248, 261.
Blackburn *vs.* Crawford, 3 Wall., 175, 194.

The appellant's domicile was not in Virginia. She was therefore not bound by the Virginia decree.

The appellee, in the first instance, set up the Virginia divorce by way of plea (17). The plea was duly overruled (25). The order overruling the plea not being appealed from, the plea dropped out of the case. He thereupon filed an answer, setting up therein the record of the Virginia proceedings in which the divorce was rendered and demanding full faith and credit for the decree of divorce (13). It thus became necessary for him to prove the divorce like any other fact.

Humes *vs.* Scruggs, 94 U. S., 22, 24.
Clements *vs.* Moore, 6 Wall., 299, 315.

The appellee made no objection to the testimony of any witness except that in the case of the complainant herself, he made the specific objection that the parties were still husband and wife, and that it was "incompetent for a wife to testify in such proceedings" (112).

Although the objection is obviously untenable, it emphasizes the waiver of all other objections, including that of estoppel by the Virginia decree. A person may waive a right which he has under the Constitution of the United States, and when the testimony was once in, without objection, it was too late to strike it out by offering the Virginia divorce

Pierce *vs.* Somerset Ry., 171 U. S., 641, 648.
Benson *vs.* U. S., 146 U. S., 325, 332.

By the testimony, thus admitted, it is disclosed that at the final parting, which occurred in the District of Columbia and within the jurisdiction of its courts, the husband put his wife away and sent her back to "her people," thus consenting to, indeed compelling, the assumption by her of domicile in this District. Under these circumstances he will not be permitted to flee to a place of constructive domicile, procure a decree of divorce upon constructive service, and avail himself

of it in the courts of a jurisdiction that is really his own home, and the only place on earth that his wife is permitted, and that by his procurement, to call by that name.

Haddock *vs.* Haddock, 201 U. S., 562, 583, 589, 599, 606.

Respectfully submitted,

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[18772]

PUBLICATION.

Every order of publication shall give the abbreviated style of the suit, state briefly its object, and require the defendants against whom it is entered, or the unknown parties, to appear within fifteen days after due publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct, and shall be posted by the clerk, at the front door of the courthouse of the county or corporation wherein the court is held, on or before the next succeeding rule day after it is entered; and the clerk shall file a certificate of the fact in the papers of the case; but the court, or the judge thereof in vacation, may, in any case, if the court or judge deem it proper, dispense with such publication in a newspaper.

Va. Code, 1904, Sec. 3231.

Section of Virginia Code Construed in 80 *Va.,* 864.

When any suit is instituted, etc., * * * ON AFFIDAVIT THAT THE DEFENDANT * * * IS NOT A RESIDENT OF THIS STATE * * * the plaintiff may forthwith sue out of the clerk's office an attachment, etc.

Va. Code, 1873, ch. 148, sec. 1.

(Amended, permitting non-residence to be stated "to the best of affiant's belief."—Va. Code, 1904, sec. 2959.)

Section Under Which Publication Was Had in This Case.

ON AFFIDAVIT THAT A DEFENDANT IS NOT A RESIDENT OF THIS STATE * * * an order of publication may be entered, etc.

Va. Code, 1904, sec. 3230.

Personal Service.

* * * Personal service of the summons * * * may be made on a non-resident defendant out of this State, which service shall have the same effect, and no other, as an order of publication duly executed.

Va. Code, 1904, supplement, 1910, sec. 3232.

Decree May Be Set Aside.

Any * * * defendant who was not served with process and did not appear in the case before the date of such * * * decree * * * may, within three years from that date * * * petition to have the case reheard, and may plead or answer, and have any injustice in the proceedings corrected.

Va. Code, 1904, sec. 3233.